No. 17-949

IN THE

# Supreme Court of the United States

JOHN STURGEON,

*Petitioner,*

*v.*

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR PETITIONER


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## QUESTION PRESENTED

Whether the Alaska National Interest Lands Conservation Act prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private land physically located within the boundaries of the National Park System in Alaska.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is John Sturgeon.

Respondents are Bert Frost, in his official capacity as Alaska Regional Director of the National Park Service; Greg Dudgeon; Andee Sears; Ryan Zinke, Secretary of the Interior; Michael Reynolds, in his official capacity as Acting Director of the National Park Service; The National Park Service; and The United States Department of the Interior.

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## INTRODUCTION

In the decision below, the Ninth Circuit—for the second time—declared significant portions of Alaska to be subject to federal management and control based on a statute that was expressly designed to limit federal authority over State, Native Corporation, and private lands in Alaska. That result "sounds absurd, because it is." *Sekhar v. United States*, 570 U.S. 729, 738 (2013). The "simple truth" is that "Alaska is often the exception, not the rule." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1071 (2016). Congress expressly provided in the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA") that only *federal* lands would be subject to the oversight and management of the National Park Service ("NPS"). Yet the Ninth Circuit has now (again) allowed NPS to reach beyond federal land and regulate conduct that occurs solely on State, Native Corporation, or private land.

Like the last time this case was before the Court, the government seeks to defend the judgment below primarily based on alternative arguments rather than the Ninth Circuit's actual reasoning. Either way, however, the result should be the same. Under the unambiguous text of ANILCA, only land to which the federal government holds "title" may be deemed "public lands" subject to the regulatory jurisdiction of NPS. *See* 16 U.S.C. §§ 3102, 3103(c). It is undisputed that the federal government does not hold title to the waterways at issue here. The Ninth Circuit and NPS nonetheless seek to evade that dispositive fact by pointing to implicit reservations of water rights, statutory purposes, and constitutional powers that Congress has not exercised. But none of those arguments can justify writing the word "title" out of ANILCA—

especially given that this case is fraught with federalism implications that require a clear statement from Congress before displacing Alaska's sovereign authority over its lands and waters. This Court should apply ANILCA as written and reverse the judgment below.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 872 F.3d 927 and is reproduced in the Appendix to the Petition ("Pet.App.") at 1a-23a. The Ninth Circuit's earlier opinion is reported at 768 F.3d 1066 and is reproduced at Pet.App.26a-57a. The Ninth Circuit's earlier order denying rehearing en banc is unreported and is reproduced at Pet.App. 24a-25a. This Court's opinion vacating the Ninth Circuit's earlier opinion is reported at 136 S. Ct. 1061. The opinion of the United States District Court for the District of Alaska is available at 2013 WL 5888230 and is reproduced at Pet.App.58a-81a.

## JURISDICTION

The Ninth Circuit rendered its decision on October 2, 2017. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are reproduced at Pet.App.82a-88a.

## STATEMENT OF THE CASE

### A. Land Allocation in Alaska

Alaska contains 586,000 square miles of land and 95,000 square miles of water. Before statehood, the United States owned 98 percent of Alaska's land and waters. *Sturgeon*, 136 S. Ct. at 1065. To ensure the new State's economic viability, Congress granted 103,350,000 acres of land to Alaska (or 28 percent of its overall area) and required that any further conveyance of this land must reserve mineral and other rights to the State. *Id.* This unprecedented grant was driven by "fear that the territory was economically immature" and that its small, dispersed population "would be unable to support a state government." *Trustees for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987). The land grant would act "as an endowment which would yield the income that Alaska needed to meet the costs of statehood" and thus "ensure the economic and social well-being of the new state." *Id.* at 335-36.

Congress also granted Alaska "'title to and ownership of the lands beneath navigable waters' within the State, in addition to 'the natural resources within such lands and waters,' including 'the right and power to manage, administer, lease, develop, and use the said lands and natural resources.'" *Sturgeon*, 136 S. Ct. at 1065 (quoting 43 U.S.C. § 1311(a)). Because of these grants, Alaska could "fulfill its state policy 'to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.'" *Id.* (quoting Alaska Const. Art. VIII, § 1).

Statehood, however, did not resolve the land claims of Alaska Natives. Congress resolved these issues in 1971 by passing the Alaska Native Claims Settlement Act ("ANCSA") to provide "a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). ANCSA extinguished Alaska Natives' aboriginal land claims in exchange for $960 million, allowing Alaska Native-owned corporations to select approximately 40 million acres of federal land in Alaska. *Sturgeon*, 136 S. Ct. at 1065. Congress intended for the Native Corporations to use these lands and assets for economic development that would benefit the Native peoples of Alaska. 43 U.S.C. § 1607.

ANCSA also addressed land allocation between the State of Alaska and the United States by directing the Secretary of the Interior to withdraw up to 80 million acres of federal land for potential inclusion as "units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems." 43 U.S.C. § 1616(d)(2). But this process was not completed because the withdrawals never received the required Congressional approval. *Sturgeon*, 136 S. Ct. at 1065. In response, the Carter administration withdrew over 100 million acres of land, designating over 56 million acres of it as national monuments. Proclamation No. 4611, 43 Fed. Reg. 57,009 (Dec. 5, 1978) (Admiralty Island National Monument); Public Land Order No. 5653, 43 Fed. Reg. 59,756 (Dec. 21, 1978); Public Land Orders 5696-5711, 45 Fed. Reg. 9562 (Feb. 12, 1980).

### B. The Alaska National Interest Lands Conservation Act

Alaskans protested the Carter withdrawals because they subjected these lands to intrusive federal regulation. *Sturgeon*, 136 S. Ct. at 1065-66. Congress passed ANILCA in 1980 to address those concerns. 94 Stat. 2371, 16 U.S.C. § 3101 *et seq.* ANILCA had two goals: "First, to provide 'sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska.' And second, to provide 'adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Sturgeon*, 136 S. Ct. at 1066 (quoting 16 U.S.C. § 3101(d) (citation omitted)); *see City of Angoon v. Marsh*, 749 F.2d 1413, 1415-16 (9th Cir. 1984) ("Congress became aware of the need for a legislative means of maintaining the proper balance between the designation of national conservation areas and the necessary disposition of public lands for more intensive private use.").

ANILCA affected 104 million acres of Alaskan land. It rescinded the much-criticized Carter designations. *See* 16 U.S.C. § 3209(a). At the same time, however, ANILCA expanded the National Park System by over 43 million acres, creating ten new national parks, preserves, and monuments and tripling the nation's federal wilderness preservation acreage. *See Sturgeon*, 136 S. Ct. at 1066; 16 U.S.C. § 410hh. ANILCA divided federal preservation lands in Alaska into conservation system units ("CSUs"), which are defined to include "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a

National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter." 16 U.S.C. § 3102(4); *Sturgeon*, 136 S. Ct. at 1066.

Critically, however, the boundaries of CSUs did *not* precisely track the boundaries of federal preservation lands. Instead, Congress directed that "[w]henever possible, boundaries shall follow hydrographic divides or embrace other topographic or natural features." 16 U.S.C. § 3103(b). As a result, the new CSUs encompassed within their boundaries over 18 million acres of State, Native Corporation, and private land. *Sturgeon*, 136 S. Ct. at 1066.

Essential to the compromise ANILCA embodied was Congress's assurance that the millions of acres of land previously set aside for the economic and social needs of the Alaskan people would not be subject to federal control and management. This was an especially acute concern because, as noted, the CSUs were drawn to follow natural features of the landscape rather than the boundaries of federal lands. To ensure that state-owned lands would remain available for the economic and social needs of Alaskans even if they were encompassed within the boundaries of a CSU, ANILCA included an express assurance that these lands would remain free from federal control:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after

> December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

Congress defined each of the key terms in this provision, including "land," "federal land," and "public lands." "Land" means "lands, waters, and interests therein." 16 U.S.C. § 3102(1). "Federal land" means "lands the title to which is in the United States after December 2, 1980." *Id.* § 3102(2). And "public lands" means "land situated in Alaska which, after December 2, 1980, are Federal lands" except for land selected by the State of Alaska or a Native Corporation the title to which has not yet been conveyed. *Id.* § 3102(3). In addition, the statute defines "conservation system unit" to include the NPS units addressed by ANILCA. *Id.* § 3102(4). Read together with these definitions, Section 103(c) makes clear that "only 'lands, waters, and interests therein' to which the United States has 'title' are considered 'public' land 'included as a portion' of the conservation system units in Alaska." *Sturgeon*, 136 S. Ct. at 1067.

Section 103(c)'s purpose was apparent from the start of the legislative process. It began as an amendment to "make clear beyond any doubt that any State, Native, or

private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands, which, in fact, are part of the unit." 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling). "Those private lands, and those public lands owned by the State of Alaska" are thus "not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands." S. Rep. No. 96-413, at 303 (Nov. 14, 1979).

Arizona Congressman Morris Udall, ANILCA's primary sponsor in the House of Representatives, further explained that:

> We recognize that there are certain lands which have been selected by Native Corporations and which are within the exterior boundaries of some of the conservation system units .... I want to make clear that inclusion of these Native lands within the boundaries of conservation system units is not intended to affect any rights which the Corporations may have under this act, the Alaska Native Claims Settlement Act, or any other law, or to restrict use of such lands by the owning Corporations nor to subject the Native lands to regulations applicable to the public lands within the specific conservation system unit.

125 Cong. Rec. 9905 (1979).

Senator Ted Stevens of Alaska agreed:

> The fact that Native lands lie within the boundaries of conservation system units is not intended to affect any rights which the corporations have under this act, the Alaska Native Claims Settlement Act, or any other law.... The Native organizations have been given repeated assurances that including their lands within conservation units will not affect the implementation of the Native Claims Settlement Act.

126 Cong. Rec. 21,882 (1980).

On that understanding, Section 103(c) was added to the final version of ANILCA via concurrent resolution. *See* H. Con. Res. 452, 96th Cong. (1980). Only an express statutory prohibition would guarantee that some "sharp lawyer" would not use "catch words" to circumvent Congress's intention that "the fact that [land] is within the boundaries drawn on the map for that conservation unit does not in any way change the status of that State, native or private land or make it subject to any of the laws or regulations that pertain to U.S. public lands." 125 Cong. Rec. 11,158 (1979). In sum, Congress enacted Section 103(c) to establish unequivocally that "only public lands (and not State or private lands) are to be subject to the conservation unit regulations applying to public lands." 126 Cong. Rec. 30,498 (1980) (statement of Rep. Udall).

### C. ANILCA's Regulatory History

For sixteen years following the statute's enactment, NPS interpreted ANILCA to deny it authority to regulate

State, Native Corporation, and private lands physically located within the boundaries of CSUs. In 1981, NPS issued regulations to "provide interim guidance on public uses of National Park System units in Alaska, including units established by the Alaska National Interest Lands Conservation Act." 46 Fed. Reg. 31836 (June 17, 1981). The preamble explained that:

> Sections 103(c) and 906(o) of ANILCA generally restrict the applicability of National Park Service regulations to federally owned lands within park area boundaries. Consistent with the statute and the explanatory legislative history ... § 13.2(e) restricts the applicability of these regulations to 'federally owned' lands (defined to mean all land interests held by the Federal government including unconveyed Native selections) within park area boundaries .... These regulations would not apply to activities occurring on State lands. Similarly, these regulations would not apply to activities occurring on Native or any other non-federally owned land interests located inside park area boundaries.

*Id.* at 31843.

As promulgated in 1983, 36 C.F.R. § 1.2(b) provided that:

> The regulations contained in Parts 1 through 7 of this chapter are not applicable on privately owned lands and waters (including Indian lands and waters owned individually or tribally)

> within the boundaries of a park area, except as may be provided by regulations relating specifically to privately owned lands and waters under the legislative jurisdiction of the United States.

48 Fed. Reg. 30275 (June 30, 1983). 36 C.F.R. § 1.4, in turn, defined "legislative jurisdiction" to mean "lands and waters under the exclusive or concurrent jurisdiction of the United States." 48 Fed. Reg. at 30261. NPS added that the regulation was "intended to also include State inholdings that are under the legislative jurisdiction of the United States." *Id.*

Confusion nonetheless persisted as to the regulatory status of State-owned lands and the meaning of the phrase "legislative jurisdiction of the United States." In 1987, NPS resolved this confusion by revising Section 1.2(b) to provide:

> Except for regulations containing provisions that are specifically applicable, regardless of land ownership, on lands and waters within a park area that are under the legislative jurisdiction of the United States, the regulations contained in Parts 1 through 5 and Part 7 of this chapter do not apply on non-federally owned lands and waters or on Indian lands and waters owned individually or tribally within the boundaries of a park area.

52 Fed. Reg. 35239 (Sept. 18, 1987).

NPS addressed the question of State-owned lands by broadening the exemption from NPS regulations to include all "non-federally owned lands and waters or [] Indian lands and waters." *Id.* As to the meaning of the "legislative jurisdiction of the United States," NPS explained that "when applied to non-federal lands, [it] means lands and waters over which the State has ceded some or all of its legislative authority to the United States." *Id.* at 35238.

NPS reversed course in 1996, extending all of its regulations to non-federal lands within CSUs in Alaska. To accomplish this, NPS promulgated 36 C.F.R. § 1.2(a)(3), which provides that NPS regulations apply to "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters ... *without regard to the ownership of submerged lands, tidelands, or lowlands.*" 61 Fed. Reg. 35136 (July 5, 1996) (emphasis added). NPS also revised 36 C.F.R. § 1.2(b) to provide that the "regulations contained in parts 1 through 5, part 7, and part 13 of this chapter do not apply on non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, *except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.*" *Id.* (emphasis added). Among the NPS regulations made applicable to State-owned lands is 36 C.F.R. § 2.17(e), which bans the use of hovercraft within NPS boundaries.

NPS therefore claimed power to enforce both its general regulations—including the hovercraft ban in 36 C.F.R. § 2.17(e)—and its Alaska-specific NPS regulations in 36 C.F.R. Part 13 over all State-owned navigable waters

within the boundaries of the CSUs that ANILCA created or expanded. NPS brushed aside comments arguing that Section 103(c) of ANILCA "should be interpreted as superseding NPS authority to regulate [non-federal] waters within park boundaries." 61 Fed. Reg. at 35,135. According to NPS, Section 103(c) "was characterized by Congress as a minor technical provision" and interpreting it to allow NPS regulation of nonfederal navigable waters within CSUs would be "consistent with [ANILCA's] underlying protective purposes." *Id.*

**D. Factual Background**

Petitioner John Sturgeon is a lifelong Alaskan. He has hunted moose along the Nation River in Alaska for nearly 40 years. *Sturgeon*, 136 S. Ct. at 1064. From 1990 until the events giving rise to this suit, he traveled by means of a small personal hovercraft, which allowed him to float over the river's shallow, difficult portions to his preferred hunting grounds. *Id.*; Pet.App.31a. Part of Mr. Sturgeon's route along the Nation River lies within the the Yukon-Charley Rivers National Preserve ("Yukon-Charley"), which is located in east-central Alaska, west of the village of Eagle. ANILCA created Yukon-Charley as a CSU in connection with its expansion of the Park System in 1980. *See* 16 U.S.C. § 410hh(10). Mr. Sturgeon must transit through Yukon-Charley along the Nation River to reach his preferred hunting grounds, although the grounds themselves are not within the CSU. *Sturgeon*, 136 S. Ct. at 1064.

Because the Nation River is navigable, *see Alaska v. United States*, 201 F.3d 1154, 1158 (9th Cir. 2000), the State of Alaska holds title to the riverbed and "'the natural

resources within such lands and waters,' including 'the right and power to manage, administer, lease, develop, and use the said lands and natural resources.'" *Sturgeon*, 136 S. Ct. at 1065 (quoting 43 U.S.C. §1311(a)). Under Alaska law, Mr. Sturgeon may use his hovercraft on the Nation River. *Id.* at 1064; *see also* Alaska Const. Art. VIII, § 3 ("Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."); Alaska Admin. Code tit. 11, § 96.020.

In the fall of 2007, Mr. Sturgeon entered the Nation River from the Yukon River by hovercraft while traveling to his usual hunting grounds. *Sturgeon*, 136 S. Ct. at 1066. Approximately two miles upriver, while stopped on a gravel bar to repair the hovercraft's steering cable, he was approached by Park Service rangers. *Id.* at 1066-67. They informed him that it was a crime to operate the hovercraft in the Yukon-Charley. *Id.* Mr. Sturgeon explained that the prohibition did not apply because the hovercraft was on a State-owned waterway. *Id.* at 1067. The rangers nevertheless ordered him to remove his hovercraft from within the boundaries of the Yukon-Charley. *Id.*

After returning from his thwarted hunting trip, Mr. Sturgeon communicated with NPS Special Agent Andee Sears in Anchorage, Alaska. Pet.App.72a. She acknowledged that the State owned the Nation River's submerged lands, but insisted that hovercraft use within the Yukon-Charley was a federal crime, even on navigable waters and State-owned submerged lands, and would subject Mr. Sturgeon to criminal citation. Pet.App.31a. Fearing federal prosecution, Mr. Sturgeon stopped using his hovercraft in the Yukon-Charley. *Sturgeon*, 136 S. Ct. at 1067.

### E. Procedural History and this Court's Ruling

On September 14, 2011, Mr. Sturgeon filed suit in the U.S. District Court for the District of Alaska to, *inter alia*, enjoin NPS from applying its hovercraft regulation to the Nation River. Pet.App.59a; 36 C.F.R. §§ 1.2(a)(3), 2.17(e). He argued that Section 103(c) of ANILCA prohibited NPS from enforcing its hovercraft ban on the Nation River because: (1) the Nation River was a "land[] ... conveyed to the State," because the Alaska Statehood Act and the Submerged Lands Act gave Alaska ownership of the submerged lands beneath (and the resources within) the navigable waters in Alaska; and (2) the hovercraft ban was a "regulation[] applicable solely to public lands within such units" as it applied "solely" by virtue of NPS's authority to manage national parks. Pet.App.59a-60a.

The district court granted summary judgment to NPS. Pet.App.75a-81a. The court held that 54 U.S.C. § 100751 and its corresponding regulation, 36 C.F.R. § 1.2, gave NPS authority to ban the use of hovercraft on the Nation River because the river's bed and waters were lands "within the boundaries" of an ANILCA conversation system unit (the Yukon-Charley). Pet.App.76a. Section 103(c), the court concluded, did not limit that authority. Even assuming the Nation River had been "conveyed" to the State and was not a "public land," 16 U.S.C. § 3103(c), the court reasoned that the hovercraft regulation was not applicable "solely" to public lands within CSUs; it was of "general application across the entirety of the NPS." Pet.App.75a-81a. ANILCA thus did not prohibit application of the NPS hovercraft regulation to activities on the Nation River.

The Ninth Circuit affirmed. It held that because the hovercraft ban "applies to all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks," the court explained, it is not a "'regulation[] applicable *solely* to public lands within [CSUs].'" Pet.App.49a (quoting 16 U.S.C. § 3103(c) (emphasis added)). Accordingly, "even assuming (without deciding) that the waters of and lands beneath the Nation River have been 'conveyed to the State' for purposes of § 103(c), that subsection does not preclude the application and enforcement of the NPS regulation at issue." *Id.* ANILCA did not override NPS authority to regulate "'boating and other activities on or relating to water located within [CSUs].'" *Id.* at 48a-49a (quoting 54 U.S.C. § 100751).

This Court granted certiorari and vacated the Ninth Circuit's judgment. The Court found the Ninth Circuit's reading of Section 103(c) to be "inconsistent with both the text and context of the statute as a whole." *Sturgeon*, 136 S. Ct. at 1070. Under such an interpretation, NPS "may apply nationally applicable regulations to 'non-public' lands within the boundaries of conservation system units in Alaska, but it may not apply Alaska-specific regulations to those lands." *Id.* That was a "surprising conclusion" because "ANILCA repeatedly recognizes that Alaska is different—from its 'unrivaled scenic and geological values,' to the 'unique' situation of its 'rural residents dependent on subsistence uses,' to 'the need for development and use of Arctic resources with appropriate recognition and consideration given to the unique nature of the Arctic environment.'" *Id.* (quoting 16 U.S.C. §§ 3101(b), 3111(2), 3147(b)(5)). The Ninth Circuit's interpretation, in sum, could not be reconciled with the fact that "Alaska is often the exception, not the rule." *Id.* at 1071.

The Court acknowledged that NPS had made other arguments in defense of its regulation, which the parties had briefed and argued. *See id.* at 1072. First, the parties disputed "whether the Nation River qualifies as 'public land' for purposes of ANILCA." *Id.* Second, the parties disputed "whether the Park Service has authority under Section 100751(b) to regulate Sturgeon's activities on the Nation River, even if the river is not 'public' land, or whether—as Sturgeon argues—any such authority is limited by ANILCA." *Id.* And, third, the parties disputed whether NPS "has authority under ANILCA over both 'public' and 'non-public' lands within the boundaries of [CSUs] in Alaska, to the extent a regulation is written to apply specifically to both types of land." *Id.*

Because the Ninth Circuit's erroneous interpretation of Section 103(c) was "the sole basis for the disposition of this case," this Court remanded the case to consider NPS's alternative arguments. *Id.* at 1071. Those arguments "touch[ed] on vital issues of state sovereignty, on the one hand, and federal authority, on the other," so this Court concluded that they "should be addressed by the lower courts in the first instance." *Id.* at 1072.

### F. Proceedings on Remand

On remand from this Court, the Ninth Circuit reaffirmed its original position. This time, the court held that the Nation River is "public land" under ANILCA because "the United States has an *implied* reservation of water rights" in it. Pet.App.19a (emphasis added). Therefore, Section 103(c)'s ban on extending regulations "applicable solely to public lands" to non-federal Alaska lands was not an obstacle to prohibiting hovercraft.

The Ninth Circuit noted that "[u]nder the Submerged Lands Act, '[t]he United States retains all its navigational servitude and rights in and powers of regulation and control of [submerged] lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs.'" Pet.App.11a (quoting 43 U.S.C. § 1314(a)). But the court also recognized that a "navigational servitude is not 'public land' within the meaning of ANILCA' because 'the United States does not hold title to the ... servitude.'" *Id.* (quoting *City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986)). That was because, among other reasons, "Congress did not intend 'to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters' when it enacted ANILCA." *Id.* (quoting *Alaska v. Babbitt (Katie John I)*, 72 F.3d 698, 703 (9th Cir. 1995)).

The Ninth Circuit nevertheless concluded that the Nation River is "public land" under ANILCA pursuant to the "reserved water rights doctrine." Pet.App.17a. To reach that conclusion, the court relied on circuit precedent known as the *Katie John* decisions. Pet.App.11a-13a; (discussing *Katie John I*, 72 F.3d 698; *John v. United States (Katie John II)*, 247 F.3d 1032 (9th Cir. 2001); *John v. United States (Katie John III)*, 720 F.3d 1214 (9th Cir. 2013)). In those decisions, the Ninth Circuit held that "public lands," in the context of ANILCA's Title VIII subsistence provisions, included navigable waters where the federal government has reserved water rights. *Katie John I*, 72 F.3d at 703-04. This conclusion was mainly driven by the Ninth Circuit's desire to give effect to ANILCA's subsistence provisions and to act in accordance with what it saw as clear congressional intent to protect subsistence fishing by rural residents. *See id.* at 702 n.9;

*Katie John II*, 247 F.3d at 1037 (Tallman, J., concurring in the judgment).

Applying the reserved water rights doctrine, the Ninth Circuit held that "'[t]he United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes,' including ANILCA, and thereby has 'implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations.'" Pet.App.12a (quoting *Katie John I*, 72 F.3d at 703 & n.10). "This reservation of water rights gave the United States 'interests in some navigable waters'" and thus "ANILCA's 'definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine.'" *Id.* (quoting *Katie John I*, 72 F.3d at 703).

The Ninth Circuit concluded that the *Katie John* cases foreclosed Mr. Sturgeon's challenge to NPS's hovercraft ban. Pet.App.13a-18a. While that line of precedent arose in the markedly different context of subsistence management, the Ninth Circuit found no basis to distinguish it from this case. For example, pointing to "ANILCA's purpose of 'provid[ing] sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska,'" Pet.App.14a (quoting 16 U.S.C. § 3101(d)), and to the pre-ANILCA steps the Carter Administration took to reserve the Yukon-Charley for environmental purposes, the court held that the hovercraft ban was needed to accomplish the purpose of the reservation, Pet.App.14a-16a. While conceding that "'[r]eserved water rights are not a "title" interest,'" the Ninth Circuit found that true only "in a

narrow, technical sense" because the "word 'title' has many meanings." Pet.App.16a-17a. "Thus, 'title' to an 'interest' in water almost certainly means a vested interest in the water, such as a reserved water right." Pet.App.17a.

Finally, the court rejected Mr. Sturgeon's argument that the ban exceeds what reserved rights the United States holds, even though the use of hovercraft does not jeopardize the Nation River's water level or navigability, or otherwise compromise any interest the United States might hold in it. Pet.App.17a-18a. In the Ninth Circuit's view, NPS may seize control of "'all the bodies of water on which the United States' reserved rights *could at some point* be enforced—*i.e.*, those waters that are or *may become necessary* to fulfill the primary purposes of the federal reservation at issue.'" Pet.App.18a (quoting *Katie John III*, 720 F.3d at 1231) (emphasis in original). "Here, one of the reservation's primary purposes is to protect fish. The diminution of water in any of the navigable waters within Yukon-Charley's boundaries would necessarily impact this purpose, giving rise to a reserved water right." *Id.*

Besides writing the majority opinion, Judge Nguyen issued a concurrence that Judge Nelson joined. Pet.App.20a-23a. She agreed the panel was "bound by [its] *Katie John* decisions to analyze this case under the reserved water doctrine." Pet.App.20a. However, that was "unfortunate" because "[a] reserved water right is the right to a sufficient *volume* of water for use in an appropriate federal purpose" and this case has "nothing to do with that." *Id.* Judge Nguyen instead would have upheld the NPS hovercraft ban under the federal government's power to "regulate navigation on navigable waters" under

the Commerce Clause, *id.*, even though Congress had declined to exercise that power in enacting ANILCA, Pet.App.11a.

## SUMMARY OF ARGUMENT

I. The navigable river upon which Mr. Sturgeon sought to travel by hovercraft is not part of the National Park System, and NPS may not regulate it as though it were. Section 103(c) of ANILCA provides that only "public lands (as such term is defined in this Act)" will be considered part of a CSU, and that NPS may not regulate non-public lands and waters that happen to fall within the boundaries of a CSU. 16 U.S.C. § 3103(c). "Public lands" are defined in relevant part as "federal lands," which are in turn defined as "lands the title to which is in the United States." *Id.* § 3102(2)-(3).

It is undisputed that the United States does not have "title" to either the Nation River or the submerged lands beneath the river; the government has conceded as much in its briefs before this Court. Indeed, the State of Alaska is the only government entity that can claim "title" to the river. *See, e.g.*, *PPL Montana v. Montana*, 565 U.S. 576, 604 (2012) (States "take[] title to the navigable waters and their beds in trust for the public" upon being admitted to the Union). The Court need not definitively resolve the issue of who owns the river, however, given that the United States' undisputed *lack* of title to the Nation River is sufficient to remove those waters from ANILCA's definition of "public lands." Because the Nation River is not "public land," it is not part of a CSU and thus not subject to NPS regulations—such as the hovercraft ban—regarding the management of CSUs.

Subjecting Alaska's navigable waterways to NPS's regulatory jurisdiction would also be contrary to the purpose, structure, and history of ANILCA, and would disregard the "simple truth that Alaska is often the exception, not the rule." *Sturgeon*, 136 S. Ct. at 1071. The CSUs within Alaska were not drawn merely to encircle federal lands, but were instead drawn by reference to natural features such as rivers and mountains. As a result, the boundaries of the CSUs sweep in millions of acres of State, Native Corporation, and private lands. The express purpose of Section 103(c) was to ensure that those lands would *not* fall within NPS jurisdiction based on the mere happenstance that they were encircled by a boundary drawn based on geographical landmarks. Notably, another provision of Section 103(c) provides an explicit mechanism through which State, Native Corporation, and private lands may become subject to NPS jurisdiction, which only underscores that NPS's existing jurisdiction is limited to the "public" (*i.e.*, federally owned) lands within the CSUs.

Even if the text, structure, history, and purpose of Section 103(c) were unclear—and they are not—principles of federalism would compel a ruling in favor of Mr. Sturgeon. This case has profound implications for the federal-state balance: the decision below would dramatically expand NPS's regulatory jurisdiction in Alaska and thereby displace any state policies to the contrary (such as Alaska's decision to permit hovercraft use on navigable waters). Yet nothing in ANILCA comes close to providing the clear statement of congressional intent to displace state authority that this Court's precedents require.

II. The Ninth Circuit acknowledged that the federal government does not hold title to either the Nation River itself or the submerged lands beneath that waterway. The court nonetheless concluded that the "reserved water rights" doctrine provides a sufficient federal "interest" to render the carve-out in Section 103(c) inapplicable. That reasoning fails at every level.

The most obvious flaw in the Ninth Circuit's reasoning is its disregard of the statutory text. ANILCA's definition of "public lands" is not triggered based on a mere federal "interest" or "right"; it instead requires the United States to hold *title* to the lands at issue for them to be deemed a unit of the NPS system. The reserved water rights doctrine confers, at most, the right to *use* (or prevent others from using) a certain amount of water when necessary to achieve specific federal objectives. Any such rights are far more akin to a navigational servitude than to an alienable property right that would be tantamount to holding "title" to the property.

In all events, even where the reserved water rights doctrine applies, it merely ensures that sufficient water will be available to meet the *specific uses* for which the federal government has reserved land. This Court has never construed that doctrine as providing plenary federal regulatory authority over any body of water in which there is a reserved right. To the contrary, the Court has repeatedly emphasized that water use by non-federal parties may be curtailed under the reserved water rights doctrine *"only to the extent necessary"* to achieve the federal objective and "no more." *Cappaert v. United States*, 426 U.S. 128, 141 (1976) (emphasis added). Thus, even if—as the Ninth Circuit asserted—one of the

purposes of the Yukon-Charley reservation was to protect fish, that federal interest cannot justify a hovercraft ban that has no impact whatsoever on the volume of water available to the fish in the Nation River.

**III.** Two of the three judges on the Ninth Circuit panel agreed that the reserved water rights doctrine has "nothing to do with" this case, but they deemed themselves bound by "unfortunate" circuit precedent holding otherwise. Pet.App.20a-23. The concurring judges nonetheless would have upheld the hovercraft ban based on alternative rationales that NPS is likely to advance again before this Court. Those arguments fare no better than the dubious reserved rights theory.

First, NPS has argued that its general rulemaking authority over "units" of the National Park System supersedes any Alaska-specific limitations in ANILCA. But that argument runs headfirst into the principle that the specific controls the general in matters of statutory interpretation—a rule that applies with special force here because ANILCA addresses the "specific problem" of Alaskan lands with the "specific solution" of Section 103. *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted). Given that ANILCA carves out an express exclusion from the lands that are deemed part of an NPS "unit," the government cannot circumvent that limitation by pointing to its general rulemaking authority over lands that are classified as part of an NPS unit.

Finally, the concurring judges argued that the hovercraft ban can be upheld directly under the Commerce Clause. But no court has ever held that a regulation

exceeding an agency's statutory authority can be justified by pointing to a constitutional power Congress has not invoked. Agencies are creatures of statute and, unlike Congress, do not have roving authority to legislate to the full extent of the federal government's constitutional powers. Congress unquestionably possesses broad power to regulate navigable waters and interstate commerce, but it simply has not exercised that power here; to the contrary, Congress enacted ANILCA to expressly limit NPS authority over non-federal lands and waters in Alaska. The concurrence's reasoning fares no better than the majority's and provides no basis for affirming the judgment below.

## ARGUMENT

### I. ANILCA Excludes Alaska's Navigable Waterways from the National Park Service's Regulatory Authority.

#### A. ANILCA's Plain Text Prohibits NPS from Regulating Navigable Waters Within Alaska's CSUs.

The National Park Service has authority to promulgate regulations "necessary or proper for the use and management of System units," 54 U.S.C. § 100751(a), and "may prescribe regulations under subsection (a) concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States," *id.* § 100751(b). That general authority, however, is often restricted in the enabling legislation for specific parks. Here, ANILCA expressly prohibits NPS from exercising jurisdiction over

State, Native Corporation, and private lands and waters that happen to fall within the boundaries of a CSU in Alaska.

Section 103(c) of ANILCA provides that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c). It further instructs that "[n]o lands which, before, on, or after [the date of enactment of this Act], are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." *Id.* This provision "draws a distinction between 'public' and 'non-public lands' within the boundaries of [CSUs]," *Sturgeon*, 136 S. Ct. at 1071, and makes clear that non-public lands remain outside the reach of federal park management authority even if they happen to fall within a CSU.

ANILCA defines "public lands" as "land situated in Alaska which, after December 2, 1980, are Federal lands" except for land selected by the State of Alaska or a Native Corporation the title to which has not yet been conveyed. 16 U.S.C. § 3102(3).[1] And "federal land," in turn, means "lands *the title to which is in the United States* after December 2, 1980." *Id.* § 3102(2) (emphasis added). Putting these definitions together, "only 'lands, waters, and interests therein' to which the United States has 'title' are considered 'public' land 'included as a portion' of the conservation system units in Alaska." *Sturgeon*, 136 S. Ct. at 1067.

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1. "Land" means "lands, waters, and interests therein." 16 U.S.C. § 3102(1).

The ordinary meaning of "title" is "[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property." Black's Law Dictionary (10th ed. 2014). It is undisputed that the United States does not hold title to the navigable waters that flow over non-federal land within the boundaries of the CSUs in Alaska. Indeed, the United States has conceded as much. *See* Br. in Opp. 14 (arguing that "'[n]either sovereign nor subject can acquire anything more than a mere usufructuary right'" in navigable waters) (citation omitted). That should be the end of the matter under the plain text of ANILCA, as the relevant portion of the Nation River on which Mr. Sturgeon sought to use his hovercraft is not "land[] the title to which is in the United States after December 2, 1980." 16 U.S.C. § 3102(2).

If title to the Nation River belongs to any government entity, it is the State of Alaska. As this Court has repeatedly emphasized, "ownership of submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water is an essential attribute of [state] sovereignty." *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) (citation omitted); *see also United States v. Alaska*, 521 U.S. 1, 4 (1997) (same). The Alaska Statehood Act, 72 Stat. 339, 343 § 6(m) (1958), expressly provides that Alaska "shall have the same rights as do existing States" with respect to submerged lands.[2]

2. *See also* 43 U.S.C. § 1311(a) (Submerged Lands Act providing: "It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and

By virtue of the Equal Footing doctrine, moreover, all States (including Alaska) have an "absolute right" to their waters, *PPL Montana*, 565 U.S. at 590, under which they hold "title to the navigable waters and their beds in trust for the public," *id.* at 604. "For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842); *see also United States v. California*, 436 U.S. 32, 40 (1978) ("[T]he Submerged Lands Act transferred 'title to and ownership of' the submerged lands and waters to [the States], along with 'the right and power to manage, administer, lease, develop, and use' them.") (quoting 43 U.S.C. § 1311(a)).

Because the United States' undisputed *lack* of title to the Nation River is sufficient to resolve this dispute, the Court need not definitively resolve who ultimately holds title to the waters at issue. But given its indisputable ownership of the land submerged beneath the Nation River, the State of Alaska at a minimum has a title claim that is superior to the federal government's claim with respect to those waters.

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use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States....").

### B. Subjecting Alaska's Navigable Waters to NPS Regulatory Authority Would Be Contrary to the Purpose, Structure, and History of ANILCA.

In enacting ANILCA, Congress did not intend to pursue conservation at all costs. To the contrary, Congress designed the statute to strike a "proper balance" between "the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska" and "provid[ing] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d); *see also Sturgeon*, 136 S. Ct. at 1066 (discussing ANILCA's "two stated goals"). ANILCA is thus replete with Alaska-specific provisions that "reflect the simple truth that Alaska is often the exception, not the rule." *Sturgeon*, 136 S. Ct. at 1071.

Section 103(c) is critical to the balance Congress struck in enacting ANILCA. The statute set aside 104 million acres of land for preservation purposes and created ten new national parks, preserves, and monuments. *See id.* at 1066. At the same time, however, Congress added Section 103(c) to ANILCA to "make clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and *are not subject to regulations which are applied to public lands*, which, in fact, are part of the unit." 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling) (emphasis added).

That policy makes eminent sense in light of the manner in which Congress directed the CSUs in Alaska to be drawn. As noted above, the boundaries of CSUs

were *not* drawn merely to encircle federal lands, but were instead drawn with reference to "hydrographic divides or ... other topographic or natural features." 16 U.S.C. § 3103(b). Section 103(c) ensured that State, Native Corporation, and private lands did not become swept up in a web of federal regulations merely because they happened to be located within the boundary of a CSU that was drawn in reference to "natural features" such as rivers or mountains. "[T]he fact that [land] is within the boundaries drawn on the map for that conservation unit does not in any way change the status of that State, native or private land or make it subject to any of the laws or regulations that pertain to U.S. public lands." 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling).

The broader structure of Section 103(c) also underscores that NPS may not exercise jurisdiction over any areas other than "public lands" within CSUs. The third sentence of Section 103(c) sets forth the only way that non-public land may become subject to NPS management, providing that if "the State, a Native Corporation, or other owner" wishes to "convey" land, "the Secretary may acquire such lands in accordance with applicable law." 16 U.S.C. § 3103(c). Only after the non-public land is conveyed to the United States "shall [it] become part of the unit, and be administered accordingly." *Id.* That sentence would be superfluous if NPS could exercise jurisdiction over any land within the boundaries of a CSU regardless of whether it met the definition of "public lands."

In sum, Congress enacted Section 103(c) to establish unequivocally that "only public lands (and not State or private lands) are to be subject to the conservation unit regulations applying to public lands." 126 Cong. Rec.

30,498 (1980) (statement of Rep. Udall). "[P]rivate lands, and those public lands owned by the State of Alaska," are thus "not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands." S. Rep. No. 96-413, at 303 (Nov. 14, 1979).[3]

### C. At a Minimum, Nothing in ANILCA Reflects a Clear Congressional Intent to Subordinate State Regulation to NPS Regulation with Respect to Navigable Waters in Alaska CSUs.

Any holding that navigable waters within CSUs must be treated as "public lands" under ANILCA would also have profound federalism implications because it would subject large swaths of Alaska to intrusive NPS regulations and would displace state law to the extent it conflicted with those regulations. Yet ANILCA does not contain anything resembling the "clear statement" needed to displace Alaska's sovereignty in this manner.

The United States may not invade a State's traditional authority over waters absent a clear statement of intent

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3. Elsewhere in ANILCA, Congress expressly restricted NPS's authority over even *public lands* in Alaska CSUs. For example, NPS must allow specialized uses of public lands in Alaska, including hunting, subsistence uses, commercial fishing, and motorized transportation. *See, e.g.*, 16 U.S.C. §§ 410hh-2, 410hh-4. ANILCA similarly provides that, even on public lands, Alaska retains its preeminent authority to manage fish and wildlife. *See id.* § 3202(a) (nothing in statute intended to "enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands").

by Congress. After all, "Congress does not exercise lightly" the "extraordinary power" to "legislate in areas traditionally regulated by the States," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), and thus "does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority," *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001). For that reason, this Court does not interpret a statute to "alter the 'usual constitutional balance between the States and the Federal Government'" unless Congress made "its intention to do so unmistakably clear in the language of the statute," *Gregory*, 501 U.S. at 460 (citation omitted), that is "plain to anyone reading", *id.* at 467, through a "clear and manifest statement," *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (citation omitted).

ANILCA does not come close to indicating a congressional intent to displace state law and subject Alaska's federal waterways to the full web of NPS regulations. The statute makes no mention of navigable waters or reserved water rights, let alone explicitly authorize NPS to assert jurisdiction over State waters. And its definition of "public lands" as "lands, waters, and interests therein" the "title to which is in the United States" does not clearly include navigable waters because Alaska owns the submerged lands below its navigable waters, and the United States does not hold title to the waters themselves. *Sturgeon*, 136 S. Ct. at 1067-69. Congress knows how to include a clear statement like this when it wishes to bring waters or submerged lands within the scope of NPS jurisdiction. *Compare, e.g.*, 16 U.S.C. § 251n(a)(1) (Olympic National Park includes "all submerged lands and waters of Lake Ozette, Washington, and the Ozette River, Washington.").

Indeed, several other provisions of ANILCA further undermine NPS's assertion of regulatory authority over Alaska's navigable waters. Congress excluded navigable waters from the definition of "public lands" by specifically exempting all "lands ... granted to the Territory of Alaska or the State under any other provision of Federal law." 16 U.S.C. § 3102(3)(A). This includes title to and ownership of the land underlying its navigable waters, which passed to Alaska under the Submerged Lands Act. *Totemoff v. State*, 905 P.2d 954, 964 (Alaska 1995) (citing 43 U.S.C. § 1311(a)). Non-public lands were then excluded from CSUs, as this Court held, and rendered off-limits to park regulation through Section 103(c). *Sturgeon*, 136 S. Ct. at 1070-71. Section 1319, furthermore, provides that ANILCA shall not be construed "as expanding or diminishing Federal or State jurisdiction, responsibilities, interests, or rights in water resources, development, or control." 16 U.S.C. § 3207(2). If this language includes a clear statement, it is one that *negates* any claim of title to Alaska's waterways.

Title VIII of ANILCA eliminates any doubt. Unique among ANILCA's titles, Title VIII has its own preamble, which states that its purpose is to continue the goals of the Alaska Native Claims Settlement Act. 16 U.S.C. § 3111(4). It is likewise the only section where Congress invokes its Commerce Clause authority "to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents." *Id.* If Congress had intended the statute to grant NPS ownership or regulatory rights beyond the narrow subsistence setting, ANILCA would not have provided that "[n]othing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands *except as may be provided in [Title VIII of*

*this Act]*, or to amend the Alaska constitution" and that "[e]xcept as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands." 16 U.S.C. § 3202(a)-(b) (emphasis added).[4] The Ninth Circuit's ruling deprives these provisions of any meaningful force and effect and would have profound implications for Alaska's sovereignty despite the total lack of clear language indicating that Congress intended that outcome.

## II. The Reserved Water Rights Doctrine Provides No Basis for Upholding the Hovercraft Ban.

As explained above, ANILCA defines public land in terms of what the federal government owns. Unless "title" to the land is held by the United States, it is simply not "public land" for purposes of ANILCA. 16 U.S.C. § 3102(3). The Ninth Circuit conceded that Alaska holds title to the submerged lands under navigable waters such as the Nation River. *See* Pet.App.9a-10a. The court also acknowledged that the United States does not hold title to the waters themselves; in fact, it asserted that "[w]ater cannot be owned" at all. Pet.App.17a

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4. For these reasons, the Ninth Circuit's application of its *Katie John* subsistence decisions, *see Katie John I*, 72 F.3d 698; *Katie John II*, 247 F.3d 1032; *Katie John III*, 720 F.3d 1214, had at least some foothold in the statute. The Court need not overturn or otherwise address the issue of subsistence management regulation in Alaska in order to rule in favor of Mr. Sturgeon. Title VIII supports an array of subsistence management regulations that are beyond the scope of Mr. Sturgeon's challenge. The focus of Mr. Sturgeon's challenge is instead the Ninth Circuit's decision to *expand* the reasoning of the *Katie John* cases beyond subsistence and, in so doing, grant NPS plenary control over State waterways.

The Ninth Circuit nonetheless concluded that the "reserved water rights" doctrine gave rise to an *implied* federal interest in navigable waters within CSUs that was sufficient to uphold NPS's regulatory authority over those waters. *See* Pet.App.12a (considering whether "a federally reserved water right is implicit in a federal reservation of public land"); Pet.App.19a ("[T]he United States has an implied reservation of water rights, rendering the river public lands.").

Under the reserved water rights doctrine, "when the Federal government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert*, 426 U.S. at 138. An intent to reserve such water "is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Id.* at 139. Even if that doctrine applied to the Nation River in certain circumstances, it cannot transform the River into "public land" for purposes of Section 103(c), nor can it be used to justify NPS's hovercraft ban, for several independent reasons.

### A. Reserved Water Rights Do Not Constitute a "Title" Interest Under Section 103(c).

At the outset, the Ninth Circuit's reliance on the reserved water rights doctrine has no basis in the text of ANILCA. Section 103(c) and the related definitions provide that "public land" means in relevant part "Federal lands," which are defined as "lands the title to which is in the United States after December 2, 1980." 16 U.S.C. § 3102(2)-(3). Far from conferring "title," however, courts

have made clear that the reserved water rights doctrine merely confers a non-possessory use right. *See, e.g.*, *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 ("Neither sovereign nor subject can acquire anything more than a mere usufructuary right" in the water itself.). NPS previously conceded as much. *See* Brief of Respondent at 27, *Sturgeon v. Frost*, No, 14-1209 (U.S. Dec. 16, 2015) (arguing that "'[n]either sovereign nor subject can acquire anything more than a mere usufructuary right'" in navigable waters); Br. in Opp. 14 (same). Whatever "interest" a reserved water right creates, Pet.App.12a, it neither confers nor even resembles a title interest.

Unlike mineral rights, for example, a reserved water right is not an alienable property interest. *See, e.g.*, *Terry v. Terry*, 565 So. 2d 997, 1000 (La. App. 1990) (mineral rights are "alienable and heritable"). Reserved water rights are instead a limited reservation of sovereign power more akin to a navigational servitude than a title interest. *See United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28, (1961) (servitude is "power of the government to control and regulate navigable waters in the interest of commerce"); *PPL Montana*, 565 U.S. at 591 (States may "allocate and govern" beds of navigable waters "according to state law subject only to 'the paramount power of the United States to control such waters *for purposes of navigation* in interstate and foreign commerce.'") (emphasis added) (citation omitted); *City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986) ("Since the United States does not hold title to the navigational servitude, the servitude is not 'public land' within the meaning of ANILCA.").

In short, even if the United States held reserved water rights in *all* of Alaska's navigable waters for *any* purpose—which it does not—those rights still would not render the Nation River or any other navigable Alaska waterway "public land" under ANILCA.[5]

### B. The Hovercraft Ban Exceeds the Scope of any Reserved Water Rights the United States Might Hold.

Even if the reserved water rights doctrine applies to the Nation River in certain circumstances, the hovercraft ban exceeds the scope of whatever reserved rights the United States might hold. The doctrine is premised on the federal government's need for actual use and withdrawal of a certain volume of water; it applies where Congress sets aside land for a federal purpose but that purpose would be "entirely defeated" without the reserved water. *United States v. New Mexico*, 438 U.S. 696, 700 (1978); *see also* Pet.App.20a (concurrence below acknowledging that "[a] reserved water right is the right to a sufficient *volume*

5. Indeed, a finding that Alaska's navigable waters are "public lands" would grant NPS *more* authority over Alaska's navigable waters than it has elsewhere. The 1976 Improvement Act granted NPS only narrowly circumscribed authority over waters "located within System units." 54 U.S.C. § 100751(b). By declaring the Nation River "public land," however, the Ninth Circuit has subjected it, and all other navigable waters within Alaska CSUs, to the full array of NPS regulations under the Organic Act. This would allow NPS to impose *any* restriction it believes would "conserve the scenery, natural and historic objects, and wild-life." 54 U.S.C. § 100101(a). This is precisely the type of "topsy-turvy" interpretation of ANILCA this Court previously rejected. *Sturgeon*, 136 S. Ct. at 1071.

of water for use in an appropriate federal purpose," and "[t]his case has nothing to do with that").

Moreover, the same principles of federalism that should inform this Court's interpretation of ANILCA, *see supra* Part I.C, should also require a carefully limited application of the reserved water rights doctrine. This Court has emphasized that a "careful examination" is needed before finding an implied reservation of water "both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." *New Mexico*, 438 U.S. at 701. Indeed, "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, *it has almost invariably deferred to the state law.*" *Id.* (emphasis added).

Cases where this Court has inferred the existence of a reserved right have thus involved a specific need either to exclude others from appropriating water that feeds a federal land or to ensure that the federal government has access to a sufficient volume of water to meet its statutory objectives. In *Cappaert*, for example, the Court held that the federal government was entitled to sufficient water in a pool within the Devil's Hole Monument to preserve "the scientific value of the pool as the natural habitat of the species sought to be preserved." *Cappaert*, 426 U.S. at 141; *see also Arizona v. California*, 373 U.S. 546, 599 (1963) (by creating Indian reservation in a "hot, scorching" desert, federal government reserved water rights to the extent such water was "essential to the life of the Indian people and to the animals they hunted and the crops they raised").

But this Court has never held that a reserved water right confers on the federal government plenary regulatory power over the body of water at issue. To the contrary, the Court has emphasized that "[t]he implied-reservation-of-water-rights doctrine ... reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141. The Court thus held in *Cappaert* that water use by non-federal private parties may be curtailed "*only to the extent necessary* to preserve an adequate water level at Devil's Hole." *Id.* (emphasis added). Similarly, in *New Mexico*, the Court refused to apply the reserved water rights doctrine to enable "secondary uses" of reserved federal lands; in those circumstances, the United States must "acquire water in the same manner as any other public or private appropriator." *New Mexico*, 438 U.S. at 702. Congress has appropriated NPS funds for just such purposes, *id.* (citing 16 U.S.C. § 17j-2 (1976)), and ANILCA authorizes NPS to purchase Alaskan lands, 16 U.S.C. § 3103(c); *id.* § 3192. Such statutory authorizations would be superfluous if, as the Ninth Circuit concluded, ANILCA had implicitly granted NPS plenary regulatory authority over non-federal navigable waterways in Alaska based on reserved water rights.

The Ninth Circuit's analysis disregarded these important limitations on the reserved water rights doctrine. Because protection of fish is one of ANILCA's purposes, the Ninth Circuit reasoned that *any* diminution of water within the Yukon-Charley "would necessarily impact this purpose, giving rise to a reserved water right." Pet.App.18a. At the outset, protection of fish is just one of ANILCA's purposes. The statute was also intended to "provide[] adequate opportunity for

satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d).[6] The Ninth Circuit did not even attempt to explain how the hovercraft ban would promote *that* statutory purpose; as this case demonstrates, the ban would undermine the "economic and social needs" of Alaskans by limiting their transporation options in difficult-to-navigate areas. The Ninth Circuit's myopic focus on one statutory purpose to the exclusion of all others fails to "respect and give effect to" the "compromises" and "careful balance" embodied in ANILCA. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002).

In all events, even focusing solely on the fish-protection purpose of ANILCA, that statutory goal would grant NPS the power to limit other water uses "only to the extent necessary" to protect fish, and "no more." *Cappaert*, 426 U.S. at 141. The need to protect fish could not possibly justify banning hovercraft on navigable waterways, as hovercraft float above the water on a cushion of air, *see* Alaska Admin. Code tit. 11, § 20.990(7), and have no effect on the volume of water in the river available for the fish. Neither NPS nor the Ninth Circuit has even attempted to make the showing required by this Court's precedents: that "the purposes of the [water] reservation would be entirely defeated" without the challenged policy. *New Mexico*, 438 U.S. at 700. That is likely because there is neither any claim of water scarcity within ANILCA's CSUs, *see Katie John III*, 720 F.3d at 1238, nor any

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6. Other statutory purposes ignored by the Ninth Circuit include protecting mining operations, 16 U.S.C. § 3101(d); promoting oil and gas development, *id.* § 3142; and supporting the timber industry, *id.* § 539d.

indication that ANILCA's primary purposes would be defeated if Mr. Sturgeon continued using his hovercraft on the Nation River as he has for years. Even if the reserved water rights doctrine applied to the Nation River in certain circumstances, it cannot be invoked to justify NPS's hovercraft ban.

**III. NPS's Alternative Arguments Lack Merit.**

In remanding this case two years ago, the Court noted that NPS had offered several alternative arguments in defense of the hovercraft ban. *See Sturgeon*, 136 S. Ct. at 1072. The Ninth Circuit affirmed on the basis of its misguided application of the reserved water rights doctrine. *See supra*. But NPS's other alternative arguments fare no better and, if accepted, would be equally destructive of Alaska's sovereignty. This Court should definitively address—and reject—those arguments.

**A.** First, NPS has argued that its general park-management authority under the Organic Act and its 1976 amendments supersedes ANILCA's Alaska-specific limitations. That is, NPS asserts that Section 100751(b) of the Organic Act authorizes the agency to ban hovercraft on the Nation River even if that waterway is not "public land" because the river lies within the boundaries of a CSU. *See Sturgeon*, 136 S. Ct. at 1072; Br. in Opp. 14-15.

That argument runs headfirst into the basic interpretive rule that "a specific statute controls over a general one." *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). NPS's organic statute grants the agency authority to promulgate regulations regarding the use and management of "System units," which include

National Parks, National Monuments, National Historic Sites, and the like. *See* 54 U.S.C. § 100751(a) (general regulatory authority over "System units"); *id.* § 100751(b) (regulatory authority over "water located within System units, including water subject to the jurisdiction of the United States"); 16 U.S.C. § 410hh(10) (Yukon-Charley established as a "unit of the National Park Service").

In creating parks and preserves in Alaska such as Yukon-Charley, however, ANILCA expressly withheld regulatory authority from NPS with respect to State, Native Corporation, and private lands. ANILCA gave NPS a new, Alaska-specific mandate—to balance federal conservation with non-federal economic and social interests—and strictly limited NPS's regulatory authority to "public lands." 16 U.S.C. §§ 3101(d), 3103(c). NPS cannot rely on its general rulemaking authority when ANILCA expressly declares that certain lands—including those at issue here—are *not* to be considered part of the relevant "unit" subject to NPS jurisdiction.

Indeed, the specific-controls-the-general canon applies with special force where—as here—"Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel*, 566 U.S. at 645 (citation omitted); *see id.* (rejecting interpretation of statute in which "clause (iii) permits precisely what clause (ii) proscribes").[7] ANILCA's recognition of the unique status of Alaska's lands, waters,

7. *See also Doe v. Nat'l Bd. of Medical Examiners*, 199 F.3d 146, 155 (3d Cir. 1999) (plaintiff seeking to challenge written examination under Americans with Disabilities Act could not rely on ADA's general anti-discrimination provisions when other provisions expressly addressed "what [the ADA] requires in the context of examinations").

and resources is a paradigmatic example of a "specific solution" for a "specific problem" that necessarily limits NPS's general regulatory authority. "All those Alaska-specific provisions reflect the simple truth that Alaska is often the exception, not the rule." *Sturgeon*, 136 S. Ct. at 1071.

**B.** Finally, although the concurring judges below concluded that the reserved water rights doctrine has "nothing to do with" this case, they would have upheld the hovercraft ban directly under the Commerce Clause. Pet.App.20a-23a. The problem with that argument is that it rests on judgments *Congress itself* never made. *See, e.g., Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 635-36 (1999) (evaluating constitutionality of statute based on specific constitutional provisions invoked by Congress); *United States v. Morrison*, 529 U.S. 598, 607 (2000) (same).

Congress unquestionably possesses "significant authority to regulate activities" in navigable waters "by virtue of" its "dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power." *Alaska v. United States*, 545 U.S. 75, 116-17 (2005) (Scalia, J., concurring in part and dissenting in part). But that authority is for Congress to invoke. Federal *agencies* possess only the power Congress delegates to them. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445 (2014). If, for example, EPA enacted a regulation banning the production and sale of plastic bags despite a lack of statutory authority to do so, a court could not later uphold the rule on the ground that it was within Congress's (unexercised) Commerce Clause power.

In ANILCA, Congress invoked its Commerce Clause power only for purposes of authorizing subsistence regulation. The statute declares that "it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents." 16 U.S.C. § 3111(4). Congress did not, however, invoke the Commerce Clause to justify any of the other provisions of ANILCA.[8]

The concurrence thus badly missed the mark by noting that "ANILCA expressly left in place federal jurisdiction to regulate the navigable waters." Pet.App.21a-22a. The fact that a statute "left in place" Congress's power under the Commerce Clause—a constitutional power that was not Congress's to give away—does not answer the question of whether Congress exercised that power in the first instance. Here it did not. ANILCA did just the opposite—it cabined NPS control over non-federal navigable waters in Alaska and limited NPS's authority under the Commerce Clause to subsistence purposes. The concurrence's reasoning fares no better than the majority's.[9]

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8. The other provisions of ANILCA were likely grounded in the Property Clause, which grants Congress authority to "dispose of and make all needed Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., art. IV, sec. 3, cl. 2.

9. NPS also argued on remand that the hovercraft ban complies with Section 103(c) because it extends to both public lands and non-public lands within CSUs and therefore is not "applicable

## CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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solely to public lands within such units." 16 U.S.C. § 3103(c); *see also Sturgeon*, 136 S. Ct. at 1072. NPS wisely did not raise this argument in opposing review before this Court. The argument is circular and would render Section 103(c) meaningless.